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No. 83-434

In The

Supreme Court of the United States

October Term, 1983

FRANK FOOLS CROW, etc., et al.,

Petitioners,

vs.

TONY GULLET, etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Russel L. Barsh*
4155 42nd Avenue, N.E.
Seattle, Washington 98105
(206) 523-3174

Mario Gonzalez
P. O. Box 862
Pine Ridge, South Dakota 57770
(605) 867-5197

**Counsel of Record for Petitioners*

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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SUPPLEMENTAL STATEMENT OF THE CASE

Respondents' Brief in Opposition to the writ necessitates a clarification of some of the critical facts in this dispute. According to Respondents' Brief at pp. 6-7, the "most controversial" construction on Bear Butte has been the new access road and parking lot. "The new road gives the Petitioners all-weather access into the traditionally

ceremonial use area and . . . the parking lot . . . does not occupy any of the area utilized for the ceremonial religious activity itself." What Respondents do *not* say, is that the road and parking lot provide routine and convenient access to the ceremonial site for 100,000 tourists yearly (Jt.App., p. 185). The lot is on a rise overlooking the ceremonial site, and less than one hundred feet away. At one end of the lot, also overlooking the ceremonial site, is a pavillion and gazebo, with exhibits describing the mountain's geology, zoology, and cultural uses. It is plain that the location and construction of these facilities was calculated to invite tourists to view Petitioners' religious activities, and has had precisely that effect. Benefits to Petitioners are incidental and unwanted.*

Bear Butte is more than a mile in girth, but Respondents have located their "recreational" facilities within sight of Petitioners' ceremonial area. It would have been easy to route tourist traffic to the other side of the mountain, where it would have had little or no adverse impact, if indeed Respondents were concerned with coexistence and not the establishment of a religious "zoo."

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*Respondents aver that "many of the ceremonial users themselves requested" the road and lot. Respondents' Brief, p. 7. As noted in the Petition for the writ, p. 7, Respondents made this allegation in their testimony at trial, but could not identify with whom they had spoken except as "American Indians." Remarks of unidentified persons ("black," "white," or "Indian") are surely inadmissible hearsay.

REPLY TO RESPONDENTS' ARGUMENTS AGAINST GRANTING THE WRIT

1. The "Clearly Erroneous" Rule Does Not Apply to the Review of Conclusions of Law, or to Findings of Fact Based Upon an Erroneous Conception of Law.

Respondents urge denial of the writ on the grounds that "this Court does not grant certiorari to review evidence and discuss specific facts." Respondents' Brief, p. 8, citing *United States v. Johnston*, 268 U. S. 220, 227 (1925). While it is true that "pure questions of fact" are not reversed on appeal unless the trial findings are unsupported by substantial evidence, *Rogers v. Lodge*, 102 S. Ct. 3272, 3278-79 (1982), *Pullman-Standard v. Swint*, 102 S. Ct. 1781, 1789 (1982), the ultimate interpretation of adjudicated facts and the conclusions drawn from them are not subject to the "clearly erroneous" rule. *Johnston, supra; Harrison v. Indian Auto Shredders Co.*, 528 F. 2d 1107, 1120 (7th Cir. 1975) (balancing of interests); *United States v. Chicago*, 549 F. 2d 415, 425 (7th Cir. 1977) (whether discrimination had occurred). Also exempt is a finding of fact based on an erroneous conception of applicable law. *Southern Illinois Stone Co. v. Universal Engineering*, 592 F. 2d 446, 451 (8th Cir. 1979); *United States v. Singer Manufacturing Co.*, 374 U. S. 174, 194-95 (1963); *United States v. Texas Education Agency*, 564 F. 2d 162, 174 n. 17 (5th Cir. 1977), *cert. den.* 443 U. S. 915 (1979).

Respondents' arguments are misplaced here. The "fact" Respondents insist is subject to the "clearly erroneous" rule is that "the State's activities at Bear Butte have not interferred [sic] or infringed upon the Petitioners

[sic] religious freedom." Respondents' Brief, p. 7. Unquestionably this is a conclusion of law, not a "pure fact." The facts upon which such a conclusion might be based—facts going to the character of the State's activities and the nature of Petitioners' religion—clearly compel the opposite result, moreover. The District Court had before it the uncontradicted testimony of several Petitioners that State activities were disruptive of religious ceremonies. Respondents merely testified that they had not *intended* to be disruptive. Assuming that all witnesses were truthful, the only legitimate conclusion to be drawn was that Respondents unintentionally disrupted Petitioners' religious activities—and intent is not a defense to a First Amendment claim. *Stone v. Graham*, 449 U.S. 39, 41 (1980). There was simply *no* evidence (much less "substantial" evidence) to support a conclusion of non-infringement. The District Court must therefore be reversed on this issue *whether or not* the "clearly erroneous" rule is applied.

2. Respondents' Registration and Permit Requirements Subject Religious Activities to Discretionary State Administration.

Respondents complain that Petitioners "fail to realize that their registration and permit is not imposed on the Petitioners to enter Bear Butte, and conduct their religious activities, but . . . is required [only] for overnight camping." Respondents' Brief, p. 9. This is cutting a fine line, indeed. Petitioners' ceremonies generally last four days, and involve continuous fasting and praying (Jt.App., pp. 46, 59). Overnight use is therefore necessary. Re-

strictions on overnight use are restrictions on the duration and completion of ceremonies.

Respondents further argue that they can use registration to distinguish Petitioners from other park users, and thus limit overnight use to ceremonial needs. Respondents' Brief, p. 10. If, indeed, this is Respondents' motive, the means chosen are unduly restrictive. The simplest expedient would be to issue Petitioners permanent passes or vehicle stickers so they could use the site freely and be identified readily when necessary. Requiring them to apply for permission each time they intend to worship on the mountain gives Respondents too great an opportunity to deny access arbitrarily. Respondents have not alleged, nor will they stipulate, that they lack authority to exclude Petitioners from Bear Butte any time they wish, as they did for a whole month in 1982 (Jt. App., pp. 60, 178).

3. Agreement Among the Circuits that American Indians Lack Rights to Sacred Lands is a Compelling Reason for Granting the Writ, Not Denying It.

Respondents note that three Circuits have thus far denied American Indians' claims to the enjoyment of sacred lands, and suggest that this is grounds for denying the writ. Respondents' Brief, p. 11, citing *Badoni v. Higginson*, 638 F. 2d 172 (10th Cir. 1980), *cert. den.* 452 U. S. 954 (1981), *Hopi Tribe v. Block*, 10 I.L.R. 2132 (D.C. Cir. 1983), and the Eighth Circuit's ruling in this case. On the contrary, such a systematic denial of the First Amendment rights of persons of one race, and consistent failure to implement the unambiguous command of Congress that American Indians enjoy "access to sites" of traditional

religious significance (42 U. S. C. § 1996), is cogent reason for this Court to assert its discretionary jurisdiction and correct the Circuits.

Additionally, this dispute raises difficult new questions about the Establishment Clause, a Constitutional limitation that justly occupied much of this Court's attention last Term. Petitioners maintain that Respondents' display of traditional Indian religious practices as a tourist attraction, over worshippers' objections, is both a Free Exercise *and* an Establishment violation. It constitutes public involvement in the exhibition of a single denomination—exhibition which, in its very nature, is both involuntary and disruptive of the religion itself. Respondents argue that leaving Bear Butte in its natural state, to protect worshippers' solitude and freedom, would be an Establishment violation by placing a religious servitude on public property.* They maintain, in effect, that they are *Constitutionally powerless* to leave Petitioners in peace.

It is clear that sacred sites, many of them located on public lands, are absolutely essential to the enjoyment of most traditional American Indian religions. House Report No. 95-1308 (1978). The Constitutionality of protecting these places should be resolved unambiguously, before an

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*Whether Bear Butte *is* public property depends on the Constitutionality of the Act of February 28, 1877, 19 Stat. 254, which Petitioners have been litigating in other fora since 1980. Petition, p. 10. Petitioners' Complaint in this case challenged Respondents' title, but the District Court made no finding in this regard, noting simply that the State had purchased the site (from a non-Indian patentee) in 1962. Petition, p. 1a-1.

important part of this continent's heritage is destroyed in the mistaken belief that it lacks Constitutionally-secured status. This Court, of course, has that capacity and responsibility.

CONCLUSION

For the foregoing reasons, Petitioners respectfully suggest this Court should grant the writ, notwithstanding Respondents' arguments to the contrary, and establish unambiguously the status of American Indian religious freedom under the First Amendment.

Respectfully submitted,

RUSSEL L. BARSH
4155 42nd Avenue, N.E.
Seattle, Washington 98105
(206) 523-3174

MARIO GONZALEZ
P. O. Box 862
Pine Ridge, South Dakota 57770
(605) 862-5197

Counsel for Petitioners